

Council Of Energy Resource Tribes

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L-82

November 13, 1978

Confidential Claim Retracted

Authorized by: SC

Date: 6/12/13

The Honorable Cecil D. Andrus,
Secretary
U.S. Department of the Interior
Washington, D.C. 20240

Dear Mr. Secretary:

I was profoundly disturbed by the enclosed report of Mr. Gabriel, Executive Director of Council of Energy Resource Tribes. As you will note from his letter, the staff of CERT has been in constant discussion and negotiation with representatives of the Department of Interior concerning various aspects of Public Law 95-87 (Surface Mining Control and Reclamation Act).

In the course of those discussions it would appear that your representatives have conducted themselves in a manner contrary to the mandate of Public Law 95-87 which requires that "the Secretary shall consult with Indian tribes" with respect to questions concerning the regulations of surface mining on Indian lands. While on the one hand there has apparently been substantial consultation it seems to be designed to substantially limit Indian participation in resolving Indian problems relating to surface mining.

It would seem clear that both the Council of Energy Resource Tribes and the tribal governments require substantial legal services to gain the understanding that is the essential first step in making recommendations concerning the surface mining regulations. If such assistance is not to be provided an adequate explanation is called for.

Surely the wishes of the National Congress of American Indians and CERT should have substantial weight in your dealings with the various Indian tribes and yet it seems clear that some Department officials have attempted to divide the national tribal efforts in a way that is not beneficial to the individual tribal governments.



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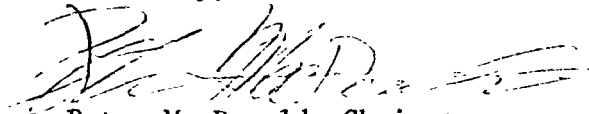
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Letter to the Honorable Cecil D. Andrus
November 13, 1978

This matter is of such great significance to the tribal interests owning or controlling large mineral deposits in the United States that I would suggest an immediate meeting to discuss and resolve the charges set forth in Mr. Gabriel's letter. In that fashion I would hope that we could continue to amicably work towards the mutual goal of tribal economic independence and self-determination.

Sincerely,

A handwritten signature in dark ink, appearing to read "Peter MacDonald", with a stylized flourish extending to the right.

Peter MacDonald, Chairman
Council of Energy Resource
Tribes

Enclosures

October 13, 1978

CERT STAFF REPORT
ON INDIAN LANDS STUDY CONTRACT NEGOTIATIONS
BETWEEN CERT AND THE OFFICE OF SURFACE MINING.

IMMEDIATE ACTION REQUESTED.

We submit this report to inform you of the very serious dissatisfaction with which the Council of Energy Resource Tribes (CERT) views its recently completed contract negotiations with the Department's Office of Surface Mining (OSM), pursuant to the Surface Mining Control and Reclamation Act of 1977.

Section 710(a) of the new Surface Mining Control and Reclamation Act (P.L. 95-87) directs the Secretary of Interior to:

study the question of the regulation of surface mining on Indian lands which will achieve the purpose of this Act and recognize the special jurisdictional status of these lands. In carrying out this study the Secretary shall consult with Indian tribes. The study report shall include proposed legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulation of surface mining of coal on Indian lands. (Emphasis added)

Section 710(b) requires that:

[t]he study report required by subsection (a) together with drafts of proposed legislation and the view of each Indian tribe which would be affected shall be submitted to the Congress as soon as possible...

(Emphasis added)

Section 710(g) requires that:

"[t]he Secretary shall provide for adequate participation by the various Indian tribes affected" (emphasis added) and authorizes up to \$700,000 in funds to be used for this purpose.

The Council of Energy Resource Tribes, a membership organization of resource-owning Indian tribes, was initially approached by the Department of Interior to perform the study and was subsequently selected by the tribes to negotiate a contract with the Department for purposes of this Act. In reporting to the Department of Interior on the contract negotiations which took place under this Act, we wish to bring to your attention our extreme dissatisfaction with, first, the severely restricted Statement of Work which was ultimately imposed by the Department and which fails completely to satisfy the requirements of the law mandating the active participation of the tribes; second, the arbitrary and irrational limitation imposed upon the use of lawyers by the tribes or by the Council of Energy Resource Tribes in carrying out a Statement of Work that, even in its shrunken form, is interlarded with numerous tasks either best or exclusively suited to the talents of a lawyer; and, third, the general attitude of disrespect toward the wishes of Indians which characterized the year-long negotiations. We request that the Secretary of Interior direct his personal attention to correct these three problems, which are further detailed below. We urge you to correct them and, thus, avoid what otherwise is nearly certain to be a failure to execute the Congressionally-imposed requirement upon the Secretary of Interior to provide for adequate participation by Indians.

1. The Statement of Work is Too Narrow and Fails to Satisfy the Requirements of the Law.

We wish to object in the strongest possible terms to the narrow scope of the contractual work statement and the process by which the Department slowly cut back on the work which was initially promised. This contract is extremely important, because it is the vehicle intended to accomplish a Congressionally-imposed mandate that the Secretary provide for close consultation with Indian tribes in the development of surface mining legislation. The contract which was consummated on September 29, 1978 between the Department and the Council of Energy Resource Tribes (CERT) is grossly inadequate when compared with this legislative directive. CERT reluctantly agreed to this contract because, in the judgement of CERT and the tribes it represents, some utility will be served by performing the work statement. But the final work statement falls far short of the participation by tribes that was envisioned by Congress when it drafted Section 710 of the Act.

For example, the contract does not permit the tribes to review or comment on their own jurisdictional status as it may relate to the assumption of full tribal regulatory authority under the Act. Furthermore, it does not even provide the means for tribes to review whatever study of jurisdiction the Solicitor's Office may perform. Thus, unless the Statement of Work is revised or other funds are made available, the Secretary will be submitting a report to Congress on the jurisdictional status of tribal lands without having consulted with Indian tribes on a single line of that report. This will be in violation of Section

and jurisdiction. Nothing, of course, would prohibit both the tribes and the Department from reviewing these issues, except for the restricted Statement of Work.

Similarly, the contract does not permit the tribes to propose legislation of their own. Furthermore, it does not even provide the means for tribes to review whatever legislation the Department may ultimately propose. Therefore, unless the Statement of Work is revised or other funds are made available, the Secretary will be submitting proposed legislation to Congress without having consulted with Indian tribes on a single line of that proposed legislation. This will be in violation of Section 710(b) which requires the Secretary to submit to Congress "drafts of proposed legislation and the view of each Indian tribe which would be affected."

In fact, unless the Statement of Work is revised or other funds are made available, the Secretary will be submitting a report to Congress as to which not a single page will have been studied or commented upon by CERT or the tribes. This will be in gross violation of Section 710(g) as well as Sections 710(a) and (b).

An internal memorandum from the Office of Surface Mining (OSM) dated May 1, 1978 contained a proposed statement of the philosophy for the conduct of this study, with which CERT fully concurred (p. 2):

At the completion of the studies, their findings will be integrated into one report which will be presented to Congress along with the

710(a) which requires that "in carrying out this study, the Secretary shall consult with Indian tribes."

This refusal to permit the tribes to comment on their own legal authority to assume regulatory control is completely opposite to the Department's policy on state legal authority. Section 731.14(d) of the Department's proposed permanent regulations under the 1977 Act requires "[a] legal opinion from the Attorney General of the State stating that the State has the legal authority to implement, administer and enforce the program and to regulate coal exploration and surface coal mining and reclamation operations..." 43 Fed. Reg. 41810 (September 18, 1978). In comments accompanying these proposed regulations, this section is explained as follows (43 Fed. Reg. at 41674):

The State is required under proposed 731.14(d) to submit a legal opinion of the State Attorney General addressing the State's legal authority to carry out the program. An alternative to this requirement would be to rely on Interior's Solicitors to determine the State's authority. The Office feels that the State Attorney General is in a better position to render this opinion. (Emphasis added)

Unless the tribes are permitted to review or comment on their own legal authority, the strong implication is created that the Department "feels" it is in a better position to render this opinion than the tribes themselves, as opposed to the situation in which the Department "feels" that the states are better positioned. This presents a clear inference of discriminatory bias against Indian tribes. We are hopeful the Department will wish to correct this by permitting tribes to comment on their own legal authority

proposed legislation mandated in section 710. At each step in the study process from the preparation of the outline to the final presentation of the report to Congress, the individual tribes will be consulted. It should be the policy of the Office of Surface Mining to regard the study and proposed legislation as the clearest expression of tribal wishes and intents and to ensure that their participation in the process is ongoing and substantive.

As late as July 1978 oral representations were made to CERT that the contractual work statement would include within its scope tribal participation in a jurisdictional study and proposed legislation. On August 15, 1978 at a meeting sponsored by CERT, Department officials announced to tribal representatives that the contract would not permit CERT or the tribes to present their own assessment on the issue of jurisdiction but that provision would be made in the contract whereby they could review and comment on a study to be performed by the Solicitor's Office. On September 5, 1978 a Department official informed CERT by telephone that the contract would not even contain provisions permitting comment on the Solicitor's study of jurisdiction. Furthermore, CERT was informed that the Department would refuse to negotiate a contract which contained any provision allowing the tribes to submit proposed legislation or even to review legislation drafted by the Department. These points were restated at a meeting held at OSM on September 7, 1978 and again in Denver on September 11, 1978 at a meeting called by OSM of the coal-owning tribes. At that meeting OSM presented, for the first time, a proposed Statement of Work. The scope of this proposal was absolutely non-negotiable with respect to the absence of any authorized activity for study or comment on jurisdiction and legislation.

This Statement, essentially unchanged, became the final contractual Statement of Work. It conflicts with the OSM policy set forth in the above-quoted memorandum of May 1, 1978, and it fails completely to satisfy the requirements of the Act. For these reasons, we request the Secretary's immediate assistance in obtaining its revision or else in providing other funds to assure adequate tribal participation.

2. Department Officials Have Imposed an Arbitrary and Irrational Limitation Upon the Use of Lawyers to Perform the Work Required Under the Contract.

Department officials, including employees of the Solicitor's Office, have imposed arbitrary and irrational limitations, amounting to nearly an absolute ban, on the use of lawyers by the tribes and CERT to carry out the work required under this contract. During the final hours of negotiation a representative from the Solicitor's Office stated that to justify an attorney working with a tribe on this project would require demonstrating to the Department's satisfaction that "no other human being on earth" was available who could do the work.

This blatant discrimination against a particular profession was never explained to our satisfaction. The only reason stated for this limitation was the need for compliance with two orders which the Secretary signed on August 22, 1978. Copies of both are attached to this letter. Both orders are addressed to a Departmental policy that "no legal work be performed outside of the Office of the Solicitor, the Office of Hearings and Appeals, and the Office of Congressional and Legislative Affairs."

Order No. 3023, Section 1. See Order No. 3024, Section 1. The Secretary has explained this policy as being "necessary in order to assure uniform legal advice throughout the Department." Order No. 3023, Section 2. In pursuit of this policy, Order No. 3023 established a committee to direct a job analysis survey of positions within the Department to determine whether legal services were being performed by employees not in any of the three offices state above. The committee was to recommend which employees should be transferred to these offices and which position descriptions should be revised. Order No. 3024, titled "Employment of Attorneys by the Department of the Interior," requires prior approval by the Solicitor before filling any legal job position, except those in the Office of Hearings and Appeals and the Office of Congressional and Legislative Affairs.

These two orders are entirely irrelevant to the tribes' use of lawyers to perform legal work in conjunction with the Indian lands study described in the statute. First, the orders are clearly addressed to job positions within the Department which require legal work and the employees who fill such job positions. They have no applicability to others who are not employees of the Department. Neither CERT, the tribes, nor any lawyer associated with them are employees of the Department; but rather, they are and will be contracting parties with the Department. Moreover, the two orders clearly do not purport to apply to contracting parties who happen, also, to be independent sovereign tribal governments and organizational representatives thereof.

Second, the Departmental policy of "assur[ing] uniform legal advice throughout the Department" which underlies the two orders will not be undermined in the least by the tribes' use of lawyers to do legal work in conjunction with this study. Obviously, that policy is directed to uniformity of legal advice provided by the Department's own lawyers to other Department employees and to others outside the Department. Here the tribes will express their views, pursuant to Section 710(b) of the Act, which calls not only for submission to Congress of the Department's study and proposed legislation but also "the view of each Indian tribe which would be affected." In presenting its views and proposals, the Department will undoubtedly have uniform legal advice. The tribes may or may not have an impact upon the Department's ultimate position, but that does not threaten the uniformity of legal advice within the Department or the uniformity of position which is ultimately expressed by the Department in its report to Congress.

Third, regardless of the intent of the two orders, they cannot override the intent of Congress, clearly expressed in the Act, that the tribes shall participate and be provided the means to express their views on the issues raised in Section 710.

Fourth, it is absolutely essential to the tribes' ability to participate that such participation include some legal work. The issues to be addressed by Section 710 are highly legal in nature and require the tribes and CERT as contracting parties to use lawyers to express the tribes' views on the legal issues involved. These issues include propositions

as fundamental as the power of tribes to regulate the coal resources on Indian lands. This power may vary depending upon the ownership of the land, and whether such lands are within or without the exterior boundaries of Indian reservations. The tribes have opinions on these and other matters which are grounded in the law. The Secretary is charged under Section 710 to study these issues and to provide for the participation of the tribes in expressing their views. To deny, in the contractual document intended to accomplish this participation, the right of the tribes and CERT to use lawyers to perform legal work on these issues would subvert the intent of Congress and deny to both Congress and to the Department the benefit of effective tribal participation.

Fifth, even with respect to the severely limited Statement of Work which is now part of the contract, it is interlarded with tasks that would be best suited, perhaps exclusively suited, to the abilities of a lawyer. Tribes cannot be expected to perform their job under this Statement of Work without having the choice to consult with their lawyers - to assist in the cataloging of tribal laws and regulations, to draft or review someone else's draft of a description of the tribal government and the legal documents under which it was established, to define the extent of shared jurisdiction in cooperative agreements with other governmental entities, to advise the tribe on the proprietary nature of certain data, to identify a tribe's responsibilities as resource owners, to identify lands having special or uncertain status, to advise the tribe concerning acceptability of various program models and for many other purposes.

For all these reasons, we urge the Secretary to direct that this arbitrary and irrational limitation be removed.

3. An Attitude of Disrespect Toward the Wishes of Indians Characterized These Negotiations.

On September 21, 1977 the National Congress of American Indians, a group consisting of more than one hundred tribes, unanimously approved a resolution calling for CERT to take the lead role in representing affected Indian tribes in consulting and participating with the Secretary of Interior in the surface mining study. The various Indian tribes affected reaffirmed their wish to have CERT represent them at several subsequent public meetings, including two sponsored by OSM in Denver on November 18, 1977 and in Albuquerque on July 27, 1978. CERT, a membership organization consisting of 25 resource-owning Indian tribes, agreed to assume that role at a meeting of its Board of Directors on February 15, 1978, and CERT staff was instructed at that time to urge OSM to begin negotiations. Despite this clear expression of will by the tribes, and despite representations made by Department officials as early as November 1977 that they would agree to negotiate with CERT, Department staff continued to attempt to divide the tribes and negotiate separate arrangements with each individual tribe. This effort to divide continued through July 1978, fully ten months after the tribes made their wishes clear that CERT should be their representatives. This was unconscionable activity on the part of Departmental staff. It not only delayed the time when the final contract with CERT would be executed but also reflected a coarse disregard for the unanimous will of the affected sovereign tribes

and for CERT. While no irremediable harm was done by such mistreatment, we urge the Secretary to take whatever steps are necessary to prevent this attitude from continuing in the future.

In stating these problems, we do not wish to suggest any dissatisfaction with our Contracting Officer, Marie A. Chavis, who has been consistently helpful and fair.

We urge the Secretary to investigate these matters immediately so that they may be corrected at the outset of this contract.